

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

NVF CORPORATION

Employer-Below Appellant

V.

RANDY THOMPSON

Employee-Below
Appellee

CIVIL ACTION NUMBER

09A-01-013-JOH

Submitted: December 2, 2009

Decided: March 25, 2010

MEMORANDUM OPINION

Upon Appeal from the Industrial Accident Board - AFFIRMED

Appearances:

Linda Wilson, Esquire, of Marshall Dennehy Warner Coleman & Goggin, Wilmington, Delaware, attorney for Employer-Below, Appellant

Timothy E. Lengkeek, Esquire, of Young Conaway Stargatt & Taylor, LLP, attorney for the Employee-Below, Appellee

HERLIHY, Judge

This is an appeal from a decision of the Industrial Accident Board (“Board”) on January 6, 2009. The Board granted claimant Randy Thompson’s petition to determine compensation due against his employer NVF, Inc. The Board found Thompson’s terminal adenocarcinoma of the esophagus (“ACE”) arose out of, or was in the course of, Thompson’s employment with NVF. Specially, the Board found that Thompson’s ACE was attributable to asbestos exposure in the NVF plant. It awarded workers’ compensation and attorney’s fees. NVF appeals the Board’s decision. The Court finds NVF’s arguments are without merit and the Board’s decision is **AFFIRMED**.

Factual Background¹

Thompson worked at NVF, Inc.² from 1978 until 2004, and held an assortment of positions there. He first was a laborer, which according to him was “a low-grade helper who does whatever the departments requests.”³ He held this position for 10 years. While a laborer, he would be responsible for loading boxes of cooked rags, throwing pulp into the washers, and cleaning. As a part of the cleanup, Thompson was required to sweep the

¹ Unless otherwise noted, this factual background is derived from the Board’s January 6, 2009, Decision on Petition to Determine Compensation Due. The Superior Court, sitting as an appellate court, will not disturb the Board’s finding of facts if they are supported by substantial evidence and will not engage in its own credibility determinations.

² NVF, Inc. was a Delaware company in the business of making vulcanized fiber, which is a type of high durability paper product that is most frequently used as insulation for circuitry, wires, and as high grade industrial sandpaper. Appellant’s Br. at 3, Ex. A.

³ Board Decision at 10.

asbestos⁴ that became dislodged and fell to the floor.⁵ Following his tenure as a laborer, Thompson became an assistant washer man. There he swept the floors in the washer room. Following that position, he became a beaterman and worked in the beater room. The beater room contained pipes wrapped in asbestos and steam generated from other areas of the mill would cause the pipes and asbestos to rot and fall to the floor. As a beaterman, he was required to pick up the debris that fell from the rotten pipes. Following Thompson's stint as a beaterman, he became a pipefitter. As a pipefitter, he was responsible for repairing leaking pipes. This would require him to use a fiber knife to remove the asbestos to ascertain the origination of the leak then repair the faulty pipe. In terms of protective gear, Thompson was only equipped with latex gloves. Finally, he worked in the shipping department, where he claimed he was still exposed to asbestos. Thompson estimated that he was exposed to asbestos about 80% of his 26 years at NVF.

In 1983, Thompson was diagnosed with acid reflux disease, although he disputed that he developed it earlier than 1993. Thompson attributed his acid reflux disease to portions of his life marked by significant stress and when the stress subsided, so would his acid reflux. In 1993, he underwent esophagastro endoscopy with biopsy and saw a specialist who did not recommend further treatment. The results of the esophagastro

⁴ NVF disputed that the material was asbestos but instead cotton fiber that splatter from the machines. The Board found the material to be asbestos.

⁵ *Id.*

endoscopy revealed the presence of another esophageal condition, Barret's Esophagus and moderate-large hiatal hernia. In 1998, following an ankle injury, Thompson's acid reflux flared up. In 2007, Thompson was diagnosed with ACE, pleural plaques and asbestosis. In early 2008, Thompson succumbed to his illness and passed away.

The Board heard testimony of physicians for both Thompson and NVF. In its decision, it first noted the testimony of Thompson's expert, Dr. Omowummi Osinubi. Dr. Osinubi is an occupational physician who is board certified in anesthesiology and preventative medicine with a specialty in occupational medicine. She has conducted extensive research into esophageal cancer and asbestos exposure. After reviewing Thompson's medical records and interviewing him, she determined that he has ACE, stage four asbestosis and asbestos-related bilateral pleural plaques. In her opinion, these conditions were causally related to Thompson's exposure to asbestos while at NVF, as there was no evidence of asbestos at his subsequent employment from 2005 until 2007. Dr. Osinubi opined that Thompson developed ACE almost thirty years younger than what is normally observed because of his high exposure to asbestos.⁶ Further, she found that asbestos exposure was a substantial causal factor to his asbestosis and bilateral pleural plaques.

⁶ Dr. Osinubi testified that ACE typically affects men between 74 and 79 years old. Thompson was 49 when he was diagnosed with it.

Dr. Osinubi explained that ACE is a disease that develops from the lining of the esophagus. She explained its interplay with asbestos by testifying that when asbestos fibers are swallowed they go into the esophagus and wait for the initiator to arrive. Once the cancerous initiator arrives, the asbestos prevents the body from repairing itself and the cancerous cells continue to replicate. The Board noted, “Dr. Osinubi opined that it is the interplay between the reflux, the asbestos exposure and to some degree the smoking but primarily the asbestos exposure that caused [Thompson] to contract ACE prematurely. She reiterated that if reflux was the primary cause as [NVF] contends, [Thompson] would probably be diagnosed thirty years later.”⁷ Dr. Osinubi presented epidemiological statistics concerning the relationship between acid reflux, Barrett’s esophagus and ACE. She reported that 40 % of people with ACE do not have acid reflux or Barrett’s esophagus; that 0.05 % of people with Barrett’s esophagus develop ACE, and 0.00065 % people with acid reflux develop ACE.

Dr. Osinubi also investigated the presence of bilateral diffuse pleural plaques that appeared on Thompson’s CT scans and chest x-rays. She explained the pleural plaques are an abnormal type of tissue that become deposited on the lungs and create irritation. She testified that the specific arrangement of pleural plaque is consistent with a person who has been exposed to asbestos. She was able to conclude to a reasonable degree of medical certainty that Thompson’s disease was caused by asbestos. On cross examination, Dr.

⁷ *Id.* at 4.

Osinubi testified that she never saw the machines in the NVF plant and that she was not familiar with the precise type of asbestos to which Thompson was exposed.

The Board also heard the testimony of Dr. Irwin Stoloff, a board certified doctor in internal medicine, by deposition. He reviewed Thompson's medical records and did not examine him. He testified that Thompson was exposed to asbestos while at NVF and that exposure to asbestos was a substantial contributing factor to Thompson's conditions. Dr. Stoloff parroted much of Dr. Osinubi's testimony regarding ACE's epidemiology and symptomatology. He also stated that "there is no evidence of asbestos exposure outside of [Thompson's] work."⁸ He also disputed NVF's expert, Dr. Michael Warhol's, opinion that there is no association between asbestosis and ACE. Like Dr. Osinubi, Dr. Stoloff did not know the type of asbestos Thompson ingested/inhaled.

Dr. Warhol presented opposing testimony on behalf of NVF. He is board certified in pathology. He reviewed Thompson's records and concluded that the ACE was caused by his acid reflux disease and was not attributable to asbestos. He opined that acid reflux will eventually progress into Barrett's Esophagus, which will become cancerous and develop into ACE. Dr. Warhol testified that the pleural plaques are not exclusively caused by asbestos and Thompson's cigarette smoking could have caused the plaques, which he opined do not cause ACE and were not disabling.

⁸ *Id.* at 8.

Dr. Warhol stated that asbestos does not lead to ACE and that he has never seen a case in which it has. He questioned the accuracy and validity of Dr. Stoloff's research and literature he cited. Due to the fact that asbestos does not lead to ACE, Dr. Warhol believes any exposure to asbestos at NVF would have been irrelevant. Furthermore, he testified that Thompson never in fact suffered from asbestosis and that his test results were misread. Dr. Warhol stated that he was not familiar with Thompson's working conditions or the amount of asbestos at NVF, but reiterated his belief that asbestos did not cause ACE, rendering asbestos at NVF irrelevant.

NVF's former CEO, William Campbell, testified on behalf of NVF. He stated that the mill in which Thompson worked was constructed in 1903, and all the pipes remained essentially the same until it closed. He testified that there was no asbestos or any other insulation on the pipes by design so that the heat from the pipes could be used to heat the plant. He stated that the cotton pulp used to make paper and vulcanized fibers would sometime splatter from the machines and hang on the pipes. He believed that Thompson misunderstood the cotton splatter from the machines for asbestos when it was dislodged from the pipes. He stated that there could never be asbestos in the areas where Thompson worked, as asbestos could fall into the machines and destroy NVF's fiber, which needed to be 100% cotton or the final product would be ruined. Campbell testified that there may have been asbestos on the external pipes that transported steam from one building to another, but nothing inside the facilities.

The Board also heard testimony from Thompson and Campbell that in 1988-89 OSHA abated NVF of asbestos. The people doing the abatement wore oxygen tanks, special suits and gloves. Campbell denies that Thompson was exposed to asbestos during this period because it was in a different part of the facility; however, Thompson testified that the abatement was occurring directly below him, that it increased the amount of asbestos in the air, and that NVF did not provide any type of protection to its employees during the abatement. All three medical experts testified that anyone in NVF's plant during the abatement would have an increased exposure to asbestos during that time.

The Board awarded compensation to Thompson. It held:

Based on the evidence, the Board is satisfied that the only location where [Thompson] could have been exposed to a level of asbestos to develop the degree of pleural plaques that [Thompson] had was at [NVF's] facility. Hence, the Board finds that [Thompson's] exposure to asbestos and the consequent illness was causally related to his occupation.⁹

The Board explicitly acknowledged that it accepted the testimonies of Drs. Osinubi and Stoloff over Dr. Warhol. It accepted the causal relationship they espoused; that ACE was caused by asbestos exposure.

The Board awarded compensation and attorney's fees in favor of Thompson. NVF appeals the Board's decision.

Parties' Contentions

NVF raises four issues on appeal. It claims the Board shifted the burden of proof

⁹ *Id.* at 20.

and required NVF to prove that Thompson's asbestos exposure occurred somewhere other than NVF. The Board relied on insufficient circumstantial evidence to prove that asbestos in fact caused ACE in that Thompson's experts only relied upon his physical condition to determine that asbestos existed at NVF and no other verifiable evidence. NVF argues that when the Board relied on circumstantial evidence, it had to find that NVF's asbestos ACE being causal related was the only reasonable inference available from the evidence, which it failed to do. Also, the Board's decision was not based on logic because it only looked to the effect and then ascertained the cause from it, ignoring other possible causes. Finally, the Board failed to follow precedent in that the decision failed to conform to a 2005 Board decision concerning alleged exposure to asbestos.

The Board held that American International Group, Inc. ("AIG") was the insurer liable in the to Thompson, and AIG initially argued the Board proceeded against a non-appearing party without confirming proper service. However, in its supplemental opening brief, AIG explicitly abandoned this argument.¹⁰

In response, Thompson argues that the Board's determinations that asbestos existed at NVF and caused Thompson's injuries were supported by substantial evidence. Also, Thompson argues that the Board properly required that Thompson meet his burden of proof. He argues that the "only inference" rule advanced by NVF is no longer applicable and the Board properly determined the evidence. Finally, Thompson argues the Board did

¹⁰ Appellant's Br. at 2.

not commit any logical fallacies because it had independent evidence that asbestos existed at NVF, and the cited precedent is inapplicable.

Thompson also argues that AIG does not have standing to prosecute this appeal because it did not timely file a notice of appeal. AIG responds by arguing that Thompson waived that claim when he filed his motion to dismiss the appeal and conceded that AIG had timely noticed its appeal.

Standard of Review

The Court's review is limited when deciding an appeal from the Industrial Accident Board. It reviews the factual record to determine whether the Board's decision is supported by substantial evidence and free of legal error.¹¹ The Court will not upset factual determinations made by the Board as long as they are supported by substantial evidence.¹² Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.¹³ It does not sit as a trier of fact with authority to weigh the evidence, determine questions of credibility and make its own factual findings and conclusions.¹⁴ The credibility of the witnesses, the weight of their testimony and the factual inferences to be drawn therefrom are for the Board to

¹¹ *Vincent v. Eastern Shores Mkts*, 970 A.2d 160, 163 (Del. 2009).

¹² *General Motors Corp. v. Freeman*, 164 A.2d 686, 689 (Del. 1960).

¹³ *Breeding v. Contractors-One-Inc.*, 549 A.2d 1102, 1104 (Del. 1988).

¹⁴ *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965).

determine.¹⁵ The Board is entitled to reject a portion of a witness' testimony and accept another portion or accept one document over another.¹⁶ Questions of law are reviewed *de novo*.¹⁷

Discussion

First, the Court holds that AIG waived its argument with respect to the due process claims it initially argued. Because that claim is waived, Thompson's argument that AIG does not have standing on appeal is moot. The remaining claims are solely between Thompson and NVF. NVF timely filed this appeal and has standing.

All of NVF's arguments generally rely on the same misrepresentation of the Board's decision: That the Board did not rely on any evidence other than Thompson's own testimony or a backwards looking inference by his experts that because Thompson suffered from an asbestos related illness, he must have been exposed to asbestos at NVF. As shown below, the Court notes that representation of the Board's decision is incorrect, the Board relied on verifiable, independent evidence to establish the presence of asbestos. Also, as the Supreme Court has held, the claimant and another's testimony can serve as the basis for the Board's decision and still be supported by substantial evidence.¹⁸

¹⁵ *Lemmon v. Northwood Const.*, 690 A.2d 912, 914 (Del. 1996).

¹⁶ *DiSabatino Bros., Inc. v. Wortman*, 453 A.2d 102, 106 (Del. 1962).

¹⁷ *Munyan v. Daimler Chrysler Corp.*, 909 A.2d 133, 136 (Del. 2006).

¹⁸ *Wenke v. GAICO*, 901 A.2d 121, 2006 WL 1476057 (Del. May 23, 2006)(TABLE).

NVF first argues that “the Board essentially agreed with proposition that [Thompson] presented no objective, affirmative evidence proving the existence of asbestos at the NVF workplace.”¹⁹ NVF also argues that both of Thompson’s experts used the fact that Thompson was suffering from a disease caused by asbestos that there must have been asbestos at NVF.

The Board affirmatively found that there was asbestos at the NVF facility. Various portions of the Board’s decision demonstrate this. “Claimant testified that asbestos continually fell from the pipes onto the equipment and the floor and he was responsible for cleaning it up and disposing of it.”²⁰ “Mr. Hall similarly testified that material or insulation was falling from the pipes creating the effect of a cloud of dust” and the material was asbestos.²¹ “In 1988/1989, OSHA abated [NVF’s] facility of asbestos.”²² “The fact that OSHA determined that such an abatement was necessary evidences a significant degree of contamination.”²³ “Based on the evidence, the Board is satisfied that the only location where [Thompson] could have been exposed to a level of asbestos to develop the degree

¹⁹ Appellant’s Br. at 7.

²⁰ Board Decision at 19.

²¹ *Id.*

²² *Id.* at 20.

²³ *Id.*

of pleural plaques that [Thompson] has was at [NVF's] facility.”²⁴ This constitutes substantial evidence to support the Board's ultimate finding that there was asbestos in the areas of the NVF plant where Thompson worked.²⁵

It is clear from the Board's decision that it did not place the burden of proof on NVF to show that Thompson was exposed to asbestos at other places. Rather it considered objective evidence to determine that NVF's facilities were laden with asbestos. The experts presented were not used to show that asbestos persisted at NVF, but rather that asbestos was the cause of Thompson's ACE. The Board independently found that asbestos persisted at the NVF facility and then credited Thompson's experts to establish the necessary link between NVF's facilities and his illness.

NVF argues that it does not have the burden to show that there was asbestos anywhere other than its facilities. It takes issue with the Board's observation that “[t]here is no evidence of asbestos exposure outside of [Thompson's] work.”²⁶ At all times, Thompson had the burden to prove to that there was asbestos at NVF's facilities. Thompson is not charged with proving that NVF was the exclusive source of asbestos. As

²⁴ *Id*

²⁵ Curiously, however, NVF seeks to undermine the Board's finding by wildly speculating Thompson was exposed to asbestos at a church or a bar he frequented.

²⁶ Appellant's Br. at 9 (citing Board Decision at 8).

this Court stated in *Lake Forest School District v. DeLong*,²⁷ “In order to recover, a claimant need only prove a nexus from which the fact finder can conclude that an exposure has occurred to the injury-causing asbestos.”²⁸ This Court stated in *Electric Hose & Rubber Co. & Dravo Corp. v. Nai*, “The Board does not have to justify its conclusion by excluding all other possible sources of asbestos exposure; its obligation is to determine whether the preponderance of the evidence supported [Claimant’s] contention that the last injurious exposure occurred at [the employer].”²⁹ As *Nai* indicated, the burden of proof was on Thompson to prove that he was exposed to harmful disease-causing asbestos at NVF. This is done by proving Thompson and asbestos were contemporaneously in the same place and the asbestos was friable.³⁰ The Board found that he meet this burden, and that finding was supported by substantial evidence. NVF’s first argument is without merit.

NVF next argues that the Board relied solely on circumstantial evidence to conclude that there was asbestos at its facility. It argues that our courts have determined that circumstantial evidence requires a higher measure of proof than is usually enjoyed by

²⁷ 1988 WL 77665 (Del. Super. Jul 20, 1988), *aff’d*, 588 A.2d 297, 1989 WL 27732 (Del. Feb. 13, 1989).

²⁸ *Id.* at * 7- 8.

²⁹ 2004 WL 304356, at *7 (Del. Super. Feb. 6, 2004) (generally the last injuries exposure rule is used to determine liability when the claimant has been employed in multiple jobs that could have exposed him to asbestos, in Thompson’s case, there is no evidence that Thompson worked at any other asbestos source than NVF).

³⁰ *Id.* at *6.

direct evidence. NVF represents the only evidence presented as “(1) Claimant’s own *ipse dixit* affirmations that the fibrous materials he cleaned up were, in fact, asbestos and (2) the oral verifications of Claimant’s experts, which were served to verify Claimant’s affirmations, even though they themselves were not based upon independent factual evidence.”³¹ It states that “[n]o direct evidence affirming asbestos inside the NVF plant was presented, such as affirmative eyewitness testimony, chemical tests of the area of exposure, industrial hygiene data, air sampling data, or chemical analysis of the garments worn by [Thompson] during the time in which he was employed by NVF.”³²

Before considering circumstantial evidence’s stature as evidence, the Court must first determine if the Board relied upon circumstantial evidence in the first place. Circumstantial evidence is “[t]estimony not based on actual personal knowledge or observation of the facts in controversy, but of other facts from which deductions are drawn, showing indirectly the facts sought to be proved.”³³ The evidence the Board used to find that NVF had asbestos in its facilities is summarized above. The Board relied upon Thompson’s own testimony about asbestos,³⁴ the OSHA mandated abatement process and

³¹ Appellant’s Br. at 10.

³² *Id.* It is important to not that the NVF facility in question was substantially damaged by a flood in 2003 and all its records were destroyed.

³³ *Black’s Law Dictionary* 243 (6th ed. 1990).

³⁴ NVF classifies Thompson’s testimony as *ipse dixit*, translated as “he himself said it,” meaning, “a bare assertion resting on the authority of the individual.” *Id.* at 828. The fact that
(continued...)

Hall's testimony. All of these are direct evidence of asbestos at NVF.

NVF cites *Suburban Propane Gas Co. v. Papen*³⁵ for the proposition that in order to use circumstantial evidence to prove proximate cause, that the inference drawn can be the only reasonable inference from the circumstantial evidence.³⁶ This argument fails for two reasons: first, more than circumstantial evidence was used to show that NVF's facilities contained asbestos insulation; second, the circumstantial evidence that NVF argues the Board relied upon was not evidence of proximate cause, as addressed in *Suburban Propane*, but was used to show asbestos' presence at NVF.

Thompson relied on, and the Board credited, the testimony of Drs. Osinubi and Stoloff to establish that asbestos caused his illness. It was within the Board's authority to accept the testimony of one party's experts over another and it did so.³⁷ "Dr. Stoloff specifically testified that his practice includes treating patients who have ACE caused by asbestosis. Dr. Osinubi has conducted extensive research into the relationship between ACE and asbestos exposure. They both opined that [Thompson's] ACE was caused by

³⁴(...continued)

the Thompson's testimony is supported by other evidence means it cannot be a bare assertion, and in fact, is not *ipse dixit*.

³⁵ 245 A.2d 795 (Del. 1965).

³⁶ Appellant's Br. at 11.

³⁷ See *DiSabatino*, 453 A.2d at 106.

significant asbestos exposure.”³⁸ Circumstantial evidence of asbestos’ presence at NVF was not used to determine that asbestos caused ACE. The Board relied upon the experts’ research and experience in the field to establish the required causal link. The Board properly considered the evidence and its decision was supported by substantial evidence. *Suburban Propane* is inapplicable. NVF’s second argument is without merit.

NVF’s third argument repeats its assertion that the Board failed to conclusively find asbestos at NVF’s facilities. This time it argues that the Board committed a logical fallacy in that it looked solely toward the result in determining the cause of Thompson’s illness. It argues, “In the current case, Claimant and the Board approved of, the above mentioned logical fallacy [of affirming the consequent], because they inferred the presence of asbestos at NVF, by looking at the results, namely Claimant’s asbestos-related diseases.”³⁹ It goes further to state, “That being said, it does not follow that said diseases must have been caused at Claimant’s place of employment. Logically speaking, he could have been routinely exposed to asbestos at his house, at his church, at a bar he frequented or even while he was in school.”⁴⁰

The Court has already held that the Board did not simply infer NVF’s facilities had asbestos because Thompson suffered from an asbestos related condition.⁴¹ It made its own

³⁸ Board Decision at 21.

³⁹ Appellant’s Br. at 14.

⁴⁰ *Id.*

⁴¹ *Supra* at 11.

independent finding based upon the evidence. Also, the Court has noted precedent that does not require a finder of fact to exclude all other possible sources of asbestos to establish causation.⁴² NVF's third argument is redundant and without merit.

The Board's findings are supported by substantial evidence and are free of legal error.

Conclusion

For the reasons stated herein, the Industrial Accident Board's decision is **AFFIRMED.**

IT IS SO ORDERED.

J.

⁴² *Supra* at 13.